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Tan Sri Eric Chia v Attorney General

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO R1–25–253 OF 2004
RAUS SHARIF J
B 26 DECEMBER 2004

Administrative Law — Remedies — Certiorari — Application to quash decision of Attorney General — Attorney General requested foreign courts to take evidence of witness and production of documents — Whether respondent a public authority — Whether act of respondent in taking of evidence under Mutual Assistance in Criminal Matters Act 2002 was part of prerogative under
C *Article 145 (3) Federal Constitution thus not amendable to review by Courts — Mutual Assistance in Criminal Matters Act 2002 — Federal Constitution art 145 (3)*

Civil Procedure — Jurisdiction — Civil jurisdiction of High Court — Whether civil court has jurisdiction to review proceedings before sessions court in exercising of criminal jurisdiction

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Criminal Procedure — Jurisdiction of court — Taking of evidence under Mutual Assistance in Criminal Matters Act 2002 by the Public Prosecutor — Whether amounted to an intrusion or interference with judicial powers of sessions court — Mutual Assistance in Criminal Matters Act 2002 s 8(1)

E The applicant was charged at the session court in Kuala Lumpur under s 409 of the Penal Code. The charges alleged that the applicant had committed criminal breach of trust. In the midst of the trial, the deputy public prosecutor ('respondent') informed the sessions court, in relation to the respondent's request to the judicial authority of Hong Kong, under the Mutual Assistance
F in Criminal Matters Act 2002 ('the Act'), to get the assistance of the Magistrates Court in Hong Kong to record the taking of oral evidence of witnesses and production of documents pertaining to the trail of payment. The respondent then applied to the sessions court for an adjournment in order to give way to the Hong Kong proceedings. At the same time, the respondent had also indicated
G that after Hong Kong, similar application may be made to the legal authority in Switzerland and Japan. This was an application by the applicant for leave to commence proceedings under O 53 r 3 of the Rules of the High Court 1980 ('RHC 1980') for an order of certiorari to quash the request made by the respondent to the judicial authority at Hong Kong, Switzerland and Japan
H pursuant to the provisions of the Act.

Held, dismissing the application:

(1) Under O 53 r 2(4) of the RHC 1980, any person who was adversely affected by the decision of any public authority shall be entitled to make
I this application. The respondent being the Attorney General of Malaysia was a public authority. Section 8(1) of the Act related to the powers and discretion conferred and imposed on the Attorney General. The section

used words or phrases 'may', 'if he is satisfied', 'there are reasonable grounds', 'evidence would be relevant' and 'request'. All these words or phrases indicated discretionary decision needing to be made to result in the request. Therefore, the requests by the respondent to the judicial authority in Hong Kong, Switzerland and Japan were decisions within the requirements and meaning of O 53 of the RHC 1980 (see para 10).

(2) The act of the respondent did not amount to an intrusion or interference with the judicial powers of the sessions court. The recording of evidence under s 8(1) of the Act was not a continuation of the applicant's criminal trial at the sessions court in Kuala Lumpur. The applicant's criminal trial had not shifted. It remained in Kuala Lumpur before the same sessions court. The sessions court judge's powers were still intact. This was because under the scheme of the Act, any evidence collected would still be subjected to the sessions court scrutiny before such evidence can be admitted and considered (see para 17).

(3) This court being a civil court has no jurisdiction to review the proceedings before the sessions court, in exercising of its criminal jurisdiction. Any challenge by the applicant to the respondent's attempt to adduce the evidence recorded under s 8(1) of the Act should be made to the sessions court. Whether such evidence was admissible or inadmissible was for the sessions court to decide. Thus, to accede to the applicant's application would tantamount to this court interfering with the jurisdiction of the sessions court (see para 19).

[**Bahasa Malaysia summary**

Pemohon telah didakwa di mahkamah sesyen Kuala Lumpur di bawah s 409 Kanun Keseksaan. Tuduhan tersebut mengatakan bahawa pemohon telah melakukan kesalahan pecah amanah. Semasa perbicaraan, timbalan pendakwa raya ('responden') memberitahu mahkamah sesyen, berkaitan permohonan responden kepada badan berkuasa kehakiman Hong Kong di bawah Akta Bantuan Bersama Dalam Perkara Jenayah 2002 ('Akta tersebut'), bahawa Mahkamah Majistret di Hong Kong akan diminta merekodkan pengambilan keterangan lisan saksi-saksi serta pengemukaan dokumen berkaitan dengan sejarah pembayaran. Responden kemudian memohon kepada mahkamah sesyen untuk penangguhan sementara prosiding di Hong Kong diteruskan. Pada masa yang sama, responden telah memberitahu mahkamah bahawa permohonan yang serupa mungkin akan ditujukan kepada badan berkuasa kehakiman di negara-negara Switzerland dan Jepun. Ini merupakan permohonan dari pemohon untuk kebenaran memulakan prosiding di bawah O 53 r 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') untuk perintah certiorari bagi membatalkan permohonan responden kepada badan berkuasa kehakiman di Hong Kong, Switzerland dan Jepun menurut peruntukan-peruntukan Akta tersebut.

Diputuskan, menolak permohonan itu:

(1) Di bawah O 53 r 2(4) KMT 1980, mana-mana orang yang terjejas akibat keputusan mana-mana pihak berkuasa awam diberi hak untuk membuat permohonan sebegini. Pihak responden sebagai Peguam Negara Malaysia merupakan pihak berkuasa awam. Seksyen 8(1) Akta tersebut berkaitan dengan kuasa dan budi bicara yang diberikan serta dikenakan terhadap Peguam Negara. Seksyen tersebut menggunakan perkataan atau frasa seperti 'may', 'if he is satisfied', 'there are reasonable grounds', 'evidence would be relevant' serta 'request'. Kesemua perkataan atau frasa tersebut menunjukkan bahawa keputusan menggunakan budi bicara perlu dibuat untuk menghasilkan permohonan tersebut. Oleh itu, permohonan responden kepada badan berkuasa kehakiman di Hong Kong, Switzerland dan Jepun merupakan keputusan-keputusan dalam kehendak dan maksud O 53 KMT 1980 (lihat perenggan 10).

(2) Perbuatan responden tidak merupakan pencerobohan atau gangguan terhadap kuasa kehakiman mahkamah sesyen. Merekod bukti di bawah s 8(1) Akta tersebut tidak merupakan sambungan perbicaraan jenayah pemohon di mahkamah sesyen di Kuala Lumpur. Perbicaraan jenayah pemohon tidak beralih. Perbicaraan tersebut tetap di Kuala Lumpur di hadapan mahkamah sesyen yang sama. Kuasa yang terletak pada hakim mahkamah sesyen masih sempurna. Ini adalah kerana di bawah skim Akta tersebut, mana-mana bukti yang dikumpulkan masih perlu diperiksa dengan rapi oleh mahkamah sesyen sebelum bukti tersebut boleh diterima masuk dan dipertimbangkan (lihat perenggan 17).

(3) Mahkamah ini yang merupakan mahkamah sivil tidak mempunyai bidang kuasa untuk mengkaji semula prosiding mahkamah sesyen yang melaksanakan bidang kuasa jenayah. Apa-apa cabaran dari pemohon terhadap cubaan responden untuk mengemukakan bukti yang direkodkan di bawah s 8(1) Akta tersebut perlu dibuat kepada mahkamah seksyen. Terpulang kepada mahkamah sesyen sama ada bukti tersebut boleh diterima masuk atau tidak. Oleh yang demikian, membenarkan permohonan pemohon adalah sama seperti mahkamah ini campur tangan dalam bidang kuasa mahkamah sesyen (lihat perenggan 19).]

Notes

For a case on application for an order of certiorari, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1490.

Legislation referred to

Courts of Judicature Act 1964
Evidence Act 1950
Federal Constitution art 145(3)

Mutual Assistance in Criminal Matters Act 2002 s 8(1), (4), 9 **A**
Penal Code s 409
Rules of the High Court 1980 O 53 r 3

Mohd Shafee bin Abdullah (Azizan bin Harun with him) (Shafee & Co) for the applicant.
Ummi Kalthum bte Abdul Majid (Abdul Rahim bin Uda and Azizah bte Hj Nawawi with her) (Senior Federal Counsel) (Attorney General's Chambers) for the respondent. **B**

Raus Sharif J:

[1] This is an application by Tan Sri Eric Chia (the applicant) for leave to commence proceedings under O 53 r 3 of the Rules of the High Court 1980 (RHC) for the following reliefs: **C**

(i) An order of certiorari to remove into this honourable court for the purpose of quashing the request made by the respondent to the judicial authority at Geneva, Switzerland purportedly pursuant to the provisions of the Mutual Assistance in Criminal Matters Act 2002 to record the taking of oral evidence of witnesses and production of document for the purpose of using the said evidence and/or documents in the trial at sessions court at Kuala Lumpur Arrest Case No 62–48–2004 between the public prosecutor and Tan Sri Eric Chia Eng Hock; and **D** **E**

(ii) An order of certiorari to remove into this honourable court for the purpose of quashing the request made by the respondent to the judicial authority at Zurich, Switzerland purportedly pursuant to the provisions of the Mutual Assistance in Criminal Matters Act 2002 to record the taking of oral evidence of witnesses and production of document for the purpose of using the said evidence and/or documents in the trial ay sessions court at Kuala Lumpur Arrest Case No 62–48–2004 between the public prosecutor and Tan Sri Eric Chia Eng Hock; and **F**

(iii) Prohibition to prevent any further action being taken by the respondent pursuant to the existing requests for examination of witnesses and production of documents made to the judicial authority in Geneva and Zurich, Switzerland and/or any future requests made by the respondent premised upon similar facts and circumstances; or **G** **H**

(iv) Alternatively, a declaration that the requests made by the respondent to the judicial authority in Geneva, Switzerland pursuant to Part II of the Mutual Assistance in Criminal Matters Act 2002 is unconstitutional and/or otherwise is an abuse of legal process; and **I**

(v) A declaration that the requests made by the respondent to the judicial Authority in Zurich, Switzerland pursuant to Part II

of the Mutual Assistance in Criminal Matters Act 2002 is unconstitutional and/or otherwise is an abuse of legal process; and

(vi) All necessary and consequential directions, as deemed fit, just and appropriate be given by this honourable court; and

(v) The costs of this application arising thereof or incidental thereto to be paid by the respondent.

[2] The facts leading to this application are these. On 10 February 2004, the applicant was charged at the session court in Kuala Lumpur under s 409 of the Penal Code. The trial of the applicant's case commenced on 2 August 2004. On the said date, the prosecution tendered an alternative charge also under s 409 of the Penal Code. Basically these charges alleged that the appellant had committed criminal breach of trust in his capacity as the managing director of Perwaja Rolling Mill and Development Sdn Bhd (Perwaja) on 18 February 1994 by dishonestly authorising the payment of RM76.4 million into the account of a company, Filsham Enterprise Incorporated.

[3] On 17 August 2004, in the midst of the trial, the deputy public prosecutor informed the learned sessions court judge, in relation to the respondent's request to the judicial authority of Hong Kong, under the Mutual Assistance in Criminal Matters Act 2002 ('the Act'), to get the assistance of the Magistrates Court in Hong Kong to record the taking of oral evidence of witnesses and production of documents pertaining to the trail of payment of RM76.4 million, into the account of Filsham Enterprise Incorporated at the American Express Bank Ltd Hong Kong. The deputy public prosecutor then applied to the learned sessions court judge for an adjournment in order to give way to the Hong Kong proceedings. At the same time, the deputy public prosecutor had also indicated that after Hong Kong, similar application may be made to the legal authority in Switzerland and Japan.

[4] On 25 August and 26 August 2004, the respondent proceeded with the recording of evidence in Hong Kong. The applicant participated in the proceedings in Hong Kong.

[5] Subsequently, on 22 October 2004, the applicant was informed by the respondent that similar proceedings under the Act for examination of witnesses in Geneva and Zurich, Switzerland had been fixed on 9 November 2004 and 10 November 2004 respectively.

[6] The applicant filed this application on 8 November 2004 under certificate of urgency. The application was fixed for hearing on 9 November 2004.

[7] Senior federal counsel, Cik Umi Kalthum bte Abdul Majid (Dato' Abdul Rahim bin Uda and Puan Azizah bte Haji Nawawi with her) appeared for the Attorney General. She raised several preliminary objections. Her objections were:

(i) The taking of evidence under the Act is part and parcel of the respondent's exercise of his prerogative under art 145(3) of the Federal Constitution and that exercise of the respondent's prerogative is not amendable to review by the courts;

(ii) The civil courts should not interfere in the jurisdiction of the criminal courts. To do so will tantamount to an usurpation of the jurisdiction and powers which the Courts of Judicature Act 1964 has clearly granted to the criminal courts;

(iii) The request of the respondent under s 8 of the Act is not in decision within the requirements and meaning of O 53 of RHC; and

(iv) The request is spent as the request has already been acted upon by the appropriate authorities in Switzerland.

[8] I will first deal on the issue whether a request under s 8 of the Act is a decision within the requirements and meaning of O 53 of RHC. To do so, it is necessary to reproduce the relevant parts of this order.

Scope (O 53 r 1)

(1) This order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purpose therein specified.

(2) This order is subject to the provisions of Chapter VIII of Part 2 of the Specific Relief Act 1950.

Application (O 53 r 2)

(1) An application for any of the reliefs specified in para 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form III A.

(2) An application for judicial review may seek any of the said relief, including a prayer for a declaration either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.

(3) Upon the hearing of an application for judicial review, the court shall not confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

(4) Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of s 29 of the Government Proceedings Act 1948 and s 54 of the Specific Relief Act 1950.

(5) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

Leave (O 53 r 3)

(1) No application under this order shall be made unless leave therefore has been granted in accordance with this rule.

(2) An application for leave must be made ex parte to a judge in chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those chambers copies of the statement and affidavits.

(4) The judge, may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[9] Clearly, under O 53 r 2(4), any person who is adversely affected by the decision of any public authority shall be entitled to make this application. The respondent being the Attorney General of Malaysia, is no doubt a public authority.

[10] But the issue raised by the learned senior federal counsel was that the requests of the respondent to the judicial authority in Geneva and Zurich, Switzerland under the Act, were not decisions within the meaning of O 53 r 2(4) of RHC. With respect, I am unable to agree. Section 8(1) of the Act clearly relates to the powers and discretion conferred and imposed on the Attorney General. The section used words or phrases 'may', 'if he is satisfied', 'there are reasonable grounds'. 'evidence would be relevant' and 'request'. All these words or phrases indicate discretionary decision needing to be made to result in the request. Thus, I am of the view that the requests by the respondent to the judicial authority in Geneva and Zurich, Switzerland were decisions within the requirements and meaning of O 53 of RHC.

[11] The next issue is whether the act of the respondent in recording the oral evidence of witnesses and for production of documents under s 8(1) of the Act is amendable to review by this court. For ease of reference, the relevant sections of the Act is hereby produced:

Application of this Part

6 A request for assistance under this Part may be made to any foreign State.

Request to be made by or through Attorney General

7(1) A request by Malaysia to a foreign State for assistance in a criminal matter under this Part shall be made by or through the Attorney General.

(2) A request under subsection (1) shall be made through the diplomatic channel.

Request for taking evidence, etc.

8(1) The Attorney General may, if he is satisfied that there are reasonable grounds for believing that any evidence would be relevant to any criminal proceedings in Malaysia, request the appropriate authority of a foreign State to arrange for:

(a) such evidence to be taken in the foreign State; and

(b) the evidence to be sent to him.

(2) The Attorney General may, if he is satisfied that there are reasonable grounds for believing that any thing would be relevant to a criminal matter in Malaysia, request the appropriate authority of a foreign State:

(a) to assist in obtaining, by search and seizure if necessary, such thing in the foreign State or a photograph or copy of the thing; and

(b) to arrange for the thing or the photograph or copy of the thing to be sent to him.

(3) Any evidence or thing, or photograph or copy of a thing, received by the Attorney General pursuant to a request under subsection (1) or (2) may, subject to the provisions of the Evidence Act 1950 (Act 56) and the Criminal Procedure Code (Act 593), be admitted as evidence at any criminal proceedings to which the request relates.

(5) In assessing the weight, if any, to be attached to any evidence received by the Attorney General pursuant to a request made under subsection (1) which has been admitted as evidence in any criminal proceedings to which the request relates, the court shall have regard to:

(a) whether it was possible to challenge the evidence taken; and

(b) whether the law of the foreign State concerned allowed the parties to the criminal proceedings to be legally represented when the evidence was being taken.

Request for attendance of person in Malaysia

9(1) The Attorney General may request the appropriate authority of a foreign State to assist in arranging for the attendance in Malaysia of a person in the foreign State for the purpose of giving any evidence or assistance of he is satisfied that:

(a) there are reasonable grounds to believe that the person is capable of giving such evidence or assistance relevant to a criminal matter involving a serious offence; and

(b) the person consents to travel to Malaysia for the purpose of

(2) The Attorney General may make arrangements with the appropriate authority of the foreign State for the purpose of the attendance of that person in Malaysia, his return to the foreign State and other relevant matters.

[12] It was submitted by the learned senior federal counsel that the taking of evidence under the Act is for the purpose of tendering it for admission in the applicant's ongoing criminal trial. Thus, according to her, this is perfectly within

the ambit and scope of the powers of the respondent under Article 145(3) of the Federal Constitution.

[13] The learned counsel for the applicant, Dato' Shafee bin Abdullah (Encik Azizan bin Harun with him) contended otherwise. He submitted that the act of respondent under s. 8 of the Act is not covered by art 145(3) of the Federal Constitution. Instead he submitted that the invocation of the provisions of the Act by the respondent in the midst of the applicant's criminal trial is an intrusion and interference with the judicial power of the sessions court. According to him, once the applicant's criminal trial commenced at the sessions court, in Kuala Lumpur, the sessions court was seized of the absolute power to hear its final conclusion and determine the charges against the applicant in the manner provided by Malaysian laws.

[14] Article 145(3) of the Federal Constitution is in the following words:

> (3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or court-martial.

[15] Clearly to me, what the respondent did in Geneva and Zurich, Switzerland was not 'to institute, conduct or discontinue any proceedings for an offence'. The respondent cannot be said to be exercising his prerogative under art 145(3) of the Federal Constitution. In fact, the respondent as the Attorney General of Malaysia, has no jurisdiction 'to institute, conduct or discontinue any proceeding for an offence' outside Malaysia.

[16] To me, to put it simply, what the respondent did in Geneva and Zurich, Switzerland was to seek assistance of the judicial authority there, to record evidence of witnesses and production of documents, which he wanted to use in the applicant's criminal trial in the sessions court, Kuala Lumpur. Thus, to me, the real issue in this application which need serious consideration is whether the act of the respondent in invoking s 8 of the Act in the midst of the applicant's criminal, can be construed as an intrusion and interference with the judicial powers of the sessions court judge.

[17] Looking at the scheme of the Act, I am of the view that the act of the respondent does not amount to an intrusion or interference with the judicial powers of the sessions court judge. To me, the recording of evidence in Geneva and Zurich, Switzerland under s 8(1) of the Act is not a continuation of the applicant's criminal trial at the sessions court in Kuala Lumpur. The applicant's criminal trial has not shifted to Switzerland. It remains in Kuala Lumpur before the same sessions court judge. The sessions court judge's powers are still very much intact. This is because under the scheme of the Act, any evidence collected in Geneva and Zurich, Switzerland will still be subjected to the sessions court judge scrutiny before such evidence can be admitted and considered.

[18] Section 8(3) of the Act clearly stated that the admission of evidence received by the respondent in any criminal proceeding is subject to the provisions of the Evidence Act 1950 and Criminal Procedure Code. Thus, the admissibility of such evidence is open to challenge by the applicant before the sessions court judge. Further, even if such evidence is admitted, s 8(4) placed a duty on the sessions court judge to assess the weight, if any, to be attached to such evidence, having regard to: (i) whether it was possible to challenge the evidence taken; and (ii) whether the law of the foreign state concerned allowed the parties to the criminal proceedings to be legally represented when the evidence was taken. In fact, among the many complaints by the applicant was that he had been denied of public hearing and the right to cross-examine witnesses in Zurich and Geneva, Switzerland as well as he was not been given the right to be defended by counsel of his choice. Thus, to me, such complaints should be addressed to the sessions court judge at the appropriate time as provided by s 8(4) of the Act.

[19] This brings me to another issue. As stated earlier, the taking of evidence in Geneva and Zurich, Switzerland by the respondent is for the purpose of adducing the said evidence in the applicant's ongoing criminal trial in the sessions court. The applicant in this application, in essence is trying to prevent it from happening. I am of the view, this course of action taken by the applicant is an abuse of the court process. This is because, this court being a civil court has no jurisdiction to review the proceedings before the sessions court, in exercising of its criminal jurisdiction. To me, any challenge by the applicant to the prosecution's attempt to adduce the evidence recorded in Geneva and Zurich, Switzerland should be made to the sessions court judge. Whether such evidence is admissible or inadmissible is for the sessions court judge to decide. Thus, to accede to the applicant's application will tantamount to this court to interfering with the jurisdiction of the sessions court. To me, it is totally unacceptable.

[20] There are hosts of other complaints by the applicant against the respondent as can be gleaned from the applicant's affidavit in support. For example, the applicant questioned the respondent's decision of invoking s 8(1) of the Act rather than s 9 of the same Act. According to the applicant, had s 9 of the Act been used by the respondent, witnesses from Zurich and Geneva, Switzerland would be produced at the sessions court in Kuala Lumpur for the purpose of taking their respective testimony and producing documents in their respective possession instead of doing so in Zurich and Geneva, Switzerland. This, according to the applicant could have saved the excessive expenses incurred by the respondent's contingent to travel to Switzerland as well as the exorbitant expenses incurred by the applicant to engage European lawyers to attend to the proceedings in Switzerland. But, I am of the view, the expenditure incurred by the respondent as well as the other personal complaints against the respondent by the applicant should be addressed elsewhere, but not to this court.

[21] For the abovesaid reasons, the applicant's application for leave is refused resulting in the whole application be dismissed with costs.

Application dismissed.

Reported by Peter Ling